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In the Supreme Court of the United States

No. 545

OCTOBER TERM, 1958.

FRED N. ACKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered June 18, 1958 and reaffirmed on September 3, 1958.

OPINIONS BELOW.

Opinions of the lower courts are attached as part of the appendix.

JURISDICTION.

The Judgment of the Court of Appeals was entered September 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. The Constitutionality of the Internal Revenue Code of 1939 in the following respects:

(a) The power to tax is not the power to confiscate (excessive rates).

(b) Progressive rates of taxation as distinguished from proportional rates are unconstitutional.

(c) The income tax law considered as a whole in its excessive rates and arbitrary provisions is openly subversive of the fundamental philosophy of the Constitution of the United States and repugnant to its continued existence.

2. That the provisions of the Internal Revenue Code of 1939 (Sec. 294 d-1-A) requiring a taxpayer to estimate his tax at the beginning of each taxable year and penalizing more than a 20% error in his estimate is unconstitutional in that the power to prophesy is not an established faculty of the human species and therefore beyond the power of Congress to require.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved is the interpretation of the Constitution of the United States as a whole and specifically its Preamble, Art. I, Sec. 8, Fifth and Fourteenth Amendments in their relationship to the Internal Revenue Code of 1939 as a whole and more specifically its provisions for surtaxes, capital losses and gains and also the provisions for filing an estimate of tax at the beginning of each taxable year. Copies of the relevant provisions of the constitution and Section 294(d)(1)(A) of the Internal Revenue Code are set forth in the Appendix hereto, *infra*, p. 27.

STATEMENT OF FACTS.

The Taxpayer's tax returns for the consecutive years of 1947, 1948, 1949 and 1950 were statistically accurate but the Audit Division disagreed with the Taxpayer's interpretation of the law as it related to the handling of losses on a note and a guarantee as ordinary business losses and denied certain local taxes and expenses as allowable deductions. The Audit Bureau also imposed a penalty for failure to file an estimate of tax and an additional penalty for an underestimate of the estimate.

As finally assessed, the Taxpayer's income, deductions and taxes assessed were as follows:

	1947	1948	1949	1950
Salary	$13,000.00	$13,000.00	$13,900.00	$17,477.66
Dividends	1,195.80	764.58	1,000.20	435.00
Interest	263.00	2,857.69	2,777.04	1,222.02
Fees—net	474.85	1,673.45	169.80	200.00
Profit on Stock	—	—	4,078.00	4,186.78
Gross Income	$14,933.65	$18,295.72	$21,928.04	$23,431.46
Loss on Stock	$12,822.82	$ 3,825.00	—	—
Taxes—Real Estate	990.86	5,668.07	4,642.14	729.91
Taxes—sales	140.00	190.00	170.00	182.44
Interest paid	4,031.35	722.59	6,972.31	1,135.15
Contributions	350.00	415.00	660.00	335.00
Loss on note	8,500.00	—	—	—
Loss on note—guarantee	—	3,465.49	—	—
Disallowed expense	—	—	—	2,290.00
Total deduction	$26,835.03	$14,286.15	$12,444.45	$ 4,672.50
Net Income	$11,901.38 (loss)	$ 4,009.57	$ 9,483.59	$18,758.96
Tax	$ 1,552.01	$ 3,565.38	$ 1,664.60	$ 4,400.43
Rate of tax	767%	89%	18%	23%

(No penalties included in the tax or rate of tax)

The case was appealed to the Tax Court on all counts where changes were made and penalties imposed, but the real issue from the beginning was the broad constitutional questions of confiscation, progressive rates, imposing a tax where there is no actual income, etc.

The technical questions whether the losses on notes and guarantees were ordinary business losses or capital

losses and whether certain taxes and other expenses were allowable deductions was in the case only to judicially confirm the correctness of the Audit Bureau decisions for the purpose of establishing a firm foundation from which to poise the constitutional questions.

TAX COURT DECISION.

As expected, the Tax Court found for the Commissioner on all counts. On the fundamental constitutional question as to the power to tax, it stated its conclusion in the following sweeping language:

> "We think that argument without merit. It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does not invalidate the taxing act. McCray v. United States, 195 U. S. 27 (1904); Clairmont L. Egtvedt, 112 Ct. Cl. 80 (1948); John A. Gebelein, Inc. v. Milbourne, 12 F. Supp. 105 (D. Md., 1935); Towne v. M'Elligott, 274 F. 960 (S. D. N. Y., 1921)."

The language of this opinion by the Tax Court was in part inspired by the Commissioner's brief. When the case was argued before the Court of Appeals, the Commissioner's brief adopted the above language verbatim as the Government's official position on the power to tax.

COURT OF APPEALS DECISION.

On appeal to the 6th Circuit, that Court agreed and disagreed with the Tax Court in the following respects:

1. That the Commissioner had correctly applied the technical aspects of the Income Tax Law as it applied to capital gains and losses and deductible expenses.

2. That the provision of the Income Tax Law requiring an estimate of tax at the beginning of each taxable year was constitutional.
3. That the imposition of an additional penalty for an underestimate of the estimate where no estimate was filed was incorrect and ordered its cancellation.
4. On the main constitutional question the Court disagreed entirely with the opinion of the Tax Court below and stated its own conclusions as to the taxing power of Congress. This portion of the opinion is probably the most important discussion of the general taxing power of Congress since the opinion of the Supreme Court in 1916 in *Brushaber v. Union*, 240 U. S. 1.

To save the Court the time of referring to the Appendix for the Court of Appeals' decision we copy here that part pertinent to the general constitutional question presented in this case:

> "However, our conclusion that the claimed deductions were properly disallowed compels us nonetheless to reach the constitutional issues raised as to the income tax provisions of the Internal Revenue Code of 1939.
>
> Petitioner asserts that these income tax provisions are unconstitutional because: (1) the rates are so high as to make the levy not a tax but a confiscation of property contrary to the Fifth Amendment to the Constitution, (2) the progressive rates are unconstitutional, and (3) the 'income tax law considered as a whole in its excessive rates and arbitrary provisions is openly subversive of the fundamental philosophy of the Constitution of the United States and repugnant to its continued existence.'
>
> The Tax Court summarily disposed of these constitutional issues with the statement: 'It has long been recognized that where a taxing statute is within

the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does not invalidate the taxing act.' [16 CCH Tax Ct. Memo. at 91.]

This declaration by the Tax Court completely overlooks petitioner's arguments by assuming the very thing that he disputes, namely, whether the Congress has the power to enact an income tax law like that found in the Internal Revenue Code of 1939.

While holding that the courts may not disturb the judgment of the Congress because of indirect effects of a statute that clearly represents an exercise of the taxing power [see, for example, *McCray v. United States*, 195 U. S. 27 (1904)], on more than one occasion the Supreme Court has adverted to the possibility that a law, although denominated a taxing statute, might not be a taxing statute at all, but one which on its face has crossed the boundary from the classification 'tax' to the classification 'taking,' so as to become subject to the limitations of the Fifth Amendment to the Constitution. [*Steward Machine Co. v. Davis*, 301 U. S. 548, 585 (1937); *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24 (1916).]

We know of no authority holding that the Congress may constitutionally enact a law which, although called a tax statute, on its face amounts to a taking of private property without compensation therefor. That such a law would fall within the area of 'taking,' rather than the area of 'taxing,' and so be subject to judicial nullification because of the limitations of the Fifth Amendment was clearly recognized by Mr. Chief Justice White speaking for the Court in *Brushaber v. Union Pacific R. R.*, *supra*, 240 U. S. 1, where he pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise 'a case where although there was a seeming exercise of the taxing power, the act com-

plained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.' [240 U. S. at 24-25.]

This principle was also recognized by Mr. Justice Cardozo speaking for the Court in *Steward Machine Co. v. Davis, supra,* 301 U. S. 548, when he wrote: '[W]e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.' [301 U. S. at 585.] Nor do we forget the ringing words of Mr. Justice Holmes when, in dissent, he declared: 'The power to tax is not the power to destroy while this Court sits.' [*Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U. S. 218, 223 (1928).]

Since the Tax Court applied an incorrect legal standard in judging petitioner's claim of unconstitutionality, it would be proper to remand the case to enable that court to weigh the evidence in light of correct legal standards. However, on surveying the entire record from which it appears that petitioner fully presented to the Tax Court both his constitutional arguments and his evidence supporting them, we think there is no reasonable basis in fact or law for a holding that the income tax provisions of the Internal Revenue Code of 1939 are unconstitutional either on their face or as applied to petitioner in this case.

The 1939 Code is unquestionably a taxing statute in substance as well as in name. The constitutionality of progressive tax rates is long settled. [*Knowlton v. Moore,* 178 U. S. 41 (1900); *Brushaber v. Union Pacific R. R., supra,* 240 U. S. 1.] The classifications drawn in question here do not appear to be either

arbitrary or unreasonable in any constitutional sense. To the contrary, in large part they represent 'the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens.' [*Burnet v. Wells*, 289 U. S. 670, 676 (1933).]

Nor can we say that the rates of tax, admittedly high, have reached confiscation or a 'taking' in the constitutional sense. All in all, much as we may as men sympathize with petitioner's arguments about our tax plight, as judges we must say that he has addressed them to the wrong forum; they are for the Congress, and not for the courts."

The complaint of the Petitioner is that the Court of Appeals having ruled that the power to tax is not the power to confiscate refused to apply its own decision to the undisputed facts of the case. If a 767% rate in 1947 and an 89% rate in 1948 is not confiscation, then what would constitute confiscation?

REASONS FOR GRANTING WRIT.

So far as the record shows, the Government of the United States is still contending officially that it has an unlimited power to tax even though the tax is confiscatory, destructive or excessive.

This amazing claim is not theory. The Government of the United States is enforcing this claim three hundred and sixty-five days of the year against every citizen in the land and succeeding at it so well that as a civilization we are already dead set on the path of mediocrity. The key evil in this law is the progressive rates of tax. It is shocking but the Government is systematically and progressively devitalizing its people in favor of a communistic form of society.

The philosophy of the Income Tax Law is as opposed to the philosophy of the United States Constitution as fire and water, and only one or the other will survive.

Strikingly, only $4,412,000,000, or 15%, of the personal income tax is collected through surtaxes divided in the following brackets. (Tax Foundation Study 1957.)

Tax Bracket	*Saving*
2,000 — 10,000	1,002,000,000
10,000 — 20,000	1,200,000,000
20,000 — 50,000	1,474,000,000
50,000 — plus	736,000,000

If the Government will stop handicapping the energetic members of its society, it will soon recover what it temporarily loses in tax income.

I am certain this Court is fully aware of the truth of everything said here and has many times privately pondered its solution as a grave national, even international, question, but what is likely to escape the Court without a precise study is on what thin legal authority progressive taxation stands.

WHAT IS THE LEGAL AUTHORITY FOR PROGRESSIVE TAXATION?

Amazingly there is very little legal authority for progressive taxation and absolutely none to sustain the rates now in vogue. In only four Supreme Court cases do you find the subject of progression in issue.

Year	*Case*	*Reference*
1895	Pollock vs. Farmers	157 U. S. 429
	"	158 U. S. 601
1898	Magoun vs. Illinois	170 U. S. 283
1900	Knowlton vs. Moore	178 U. S. 41
1916	Brushaber vs. Union	240 U. S. 1

These cases are characterized by similarities:

(1) The rates of tax both basic and progressive were very low.

(2) The opinions of the Courts did little more than approve the progressive rates without any attempt to justify them economically, philosophically or otherwise.

(3) At no point is there a thoroughgoing discussion of the principle of progression.

(4) You gain the overwhelming impression that the Court would have disapproved the present high rates out of hand.

(5) The dissent was vigorous and alive.

The last case decided as above was 1916. The matter at issue was the first Federal Income Tax Law enacted after the Sixteenth Amendment. The rate structure was simple but progressive. The first $4,000 was exempt in case of a married man and $3,000 in case of a single man. The basic rate was 1%. Surtaxes at 1% began at $20,000 and ran to 6% over $500,000. Corporations were assessed a flat 1%.

Now after forty-two years the personal exemption is $600. The basic rate is 20%. Surtaxes begin at $2,000. Taxes reach 34% at $8,000, 50% at $16,000, and then rapidly on to 91%. If you have capital losses and no offsetting capital gains, thousands upon thousands pay a substantial tax when in fact they had no income at all. This is flagrant confiscation to the point of complete dishonesty. The people are segregated into those making separate and those making joint returns. Exceptions are created only to create a demand for more exceptions. The law is lost in the sea of its own confusion.

Not only does this situation speak for itself, but I direct the Court's attention to the promise of the Supreme

Court made in *Knowlton v. Moore*, 178 U. S. 41 (1900) to review the entire question of progression if it got out of hand. Chief Justice White, speaking for the Court, at page 109 or 110 said:

> "The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."

Since 1916 not a single case has reached the Supreme Court in which the question of progression was the issue. It is now 1958. The tax rates have reached the point where all individual incentive is being systematically destroyed, and with it the spirit and animation that made this country great and powerful. The government which the people created to serve them is being used to destroy them as a free people. If the Congress has the power to tax the individual citizen to the point of confiscation, then we are in truth a nation of tax slaves.

To remedy this the Petitioner can only take refuge in the corporate wisdom of this Court with its power as the final interpreter of the Constitution. In this he has the encouragement and thought of the U. S. Court of Appeals for the Sixth Circuit, *supra*.

If there is a more important question constitutionally, economically, politically, socially or morally that confronts

this nation, I have not heard it mentioned. The course of this nation turns on your answer.

The American way of life that spanned this Continent in less than a century and gave its people more of the advantages of life than any other civilization past or present is entitled to its day in Court.

Respectfully submitted,

FRED N. ACKER,

Counsel for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Before SIMONS, Chief Judge; MILLER, Circuit Judge, and MATHES, District Judge.

MATHES, District Judge. The Tax Court sustained *in toto* respondent's determinations of deficiencies in petitioner's income tax and additions thereto under Int. Rev. Code of 1939 §§ 291(a), 294(d)(1)(A), and 294(d)(2) for the years 1947-1950 inclusive.

Petitioner does not question here the correctness of the additions to tax under § 291(a), but challenges the validity of all the deficiency determinations and additions to tax under §§ 294(d)(1)(A) and 294(d)(2) for each of the years involved.

The facts, as set out in the Tax Court's Memorandum Findings of Fact and Opinion [16 CCH Tax Ct. Memo. 89 (1957)], are not in controversy. Petitioner is an attorney and a resident of Ohio. During the relevant period petitioner was a stockholder, in some instances the sole stockholder, in several corporations. All but one of the deficiency determinations in issue upon this review concern activities of petitioner with respect to one or more of those corporations.

Petitioner not only disputes the correctness of the Tax Court's application of the Code sections involved; he also attacks the constitutionality in general of the income tax provisions of the Internal Revenue Code of 1939, and the constitutionality in particular of the requirement that a declaration of estimated tax be filed.

Inasmuch as the constitutional issues need not be reached if, as petitioner contends, the Tax Court incorrectly interpreted and applied the pertinent sections of

the Internal Revenue Code of 1939, we turn first to the statutory questions. [See: *Rescue Army v. Municipal Court*, 331 U. S. 549, 568-575 (1947); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341, 345-348 (1936) (concurring opinion of Mr. Justice Brandeis).]

In 1947, 1948, and 1949, petitioner personally paid real estate taxes on Ohio property owned by a corporation which in turn was wholly owned by him. Petitioner admits that title was kept in the corporation solely for his own convenience, that the property taxes were assessed against the corporation, and that within the period in question the corporation transacted business by selling some of the property. The Tax Court was clearly correct in sustaining respondent's determination that under the circumstances the property taxes were not deductible by petitioner. [Int. Rev. Code of 1939, § 23(c)(1); Treasury Regulation 111, § 29.23(c)-1, 26 C.F.R. (1949); *Moline Properties, Inc. v. Commissioner*, 319 U. S. 436 (1943); *Magruder v. Supplee*, 316 U. S. 394 (1942); *Gilken Corp. v. Commissioner*, 176 F. (2d) 141 (6th Cir. 1949); *Brudno v. Commissioner*, 138 F. (2d) 779 (6th Cir. 1943); and see *Simon J. Murphy Co. v. Commissioner*, 231 F. (2d) 639 (6th Cir. 1956).]

In 1950 petitioner was convicted and imprisoned for willful failure to file an income tax return for 1946. In his unsuccessful defense of this criminal prosecution petitioner expended $2,290 for legal expenses and bond costs which he urges are deductible, apparently under Int. Rev. Code of 1939, § 23(a), on the theory that defending against criminal charges is "an absolute necessity" for an attorney and that his fight in the criminal case greatly enhanced his reputation. The Tax Court properly sustained respondent's disallowance of this deduction. "A taxpayer who has been prosecuted under a

federal or state statute and convicted of a crime has not been permitted a tax deduction for his attorney's fee." [*Commissioner v. Heininger*, 320 U. S. 467, 473 n. 8 (1943); *Estate of Albert E. MacCrowe*, 14 CCH Tax Ct. Memo. 958 (1955), *aff'd, on this point and rev'd, on other grounds*, 240 F. (2d) 841 (4th Cir. 1956); see: *Tank Truck Rentals, Inc. v. Commissioner*, 356 U. S. 30 (1958); *Hoover Motor Express Co. v. United States*, 356 U. S. 38 (1958).]

In 1947 petitioner loaned $8,500 to a corporation in which he owned stock, and the loan became worthless during that year. In 1948 petitioner was required to pay a note which he had guaranteed for another corporation in which he owned stock, resulting in a $3,465.49 loss to him. Respondent determined that both of these losses were deductible only as non-business bad debts, required to be treated as short term capital losses [Int. Rev. Code of 1939, § 23(k)(4)], and so subject to the amount limitation specified in § 117(d)(2) of the Internal Revenue Code of 1939. The Tax Court found that petitioner failed to show that he was in the business of lending money to or guaranteeing the loans of corporations, and so sustained respondent's determinations. We agree. [Treasury Regulation 111 § 29.23(k)-6, 26 C.F.R. (1949); *Putnam v. Commissioner*, 352 U. S. 82, 92-93 (1956); *Wheeler v. Commissioner*, 241 F. (2d) 883 (2d Cir. 1957); *Commissioner v. Schaefer*, 240 F. (2d) 381 (2d Cir. 1957); and see *McNeill v. Commissioner*, 251 F. (2d) 863, 866-867 (4th Cir. 1958).]

For the years 1947 through 1950 respondent imposed on petitioner and the Tax Court sustained additions to tax both under § 294(d)(1)(A) for failure to file a declaration of estimated tax, and under § 294(d)(2) for substantial underestimation of estimated tax. Petitioner does

not rely on the statutory excuse of "reasonable cause and not . . . willful neglect" to justify his failure to file the declarations. Rather, he maintains that the statutory provisions requiring the filing of a declaration of estimated tax are unconstitutional because "the enumerated powers of the Congress do not include any power to compel a citizen to prophesy. It is beyond any human ability and therefore not a subject for Congressional intervention."

Since petitioner makes no attempt to establish the statutory excuse, the Tax Court correctly applied the statute in sustaining imposition of the additions to tax under § 294(d)(1)(A) for failure to file the declarations of estimated tax. And we hold with the Tax Court that petitioner's attack upon the constitutionality of the provisions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax, and imposing penalties for failure to file, is "wholly without merit." Such requirements are a valid exercise of the taxing power conferred by Article I, § 8, and the Sixteenth Amendment of the Constitution. [*Erwin v. Granquist*, 253 F. (2d) 26 (9th Cir. 1958); *Walker v. United States*, 240 F. (2d) 601 (5th Cir.), *cert. denied*, 354 U. S. 939 (1957).]

Petitioner next contends that imposition of concurrent penalties under §§ 294(d)(1)(A) and 294(d)(2) of the 1939 Code is without statutory warrant. The Tax Court held that petitioner's failure to file any estimate at all amounted to a zero estimate which, in turn, resulted in a substantial underestimate within the purview of § 294(d)(2). This holding is in accord with Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)], and is supported by a long line of Tax Court decisions [see, among others: *Clarence F. Buckley*, 29 T. C. No. 50 (1957);

Marcel Garsaud, 28 T. C. 1086, 1090 (1957); *Harold C. Marbut*, 28 T. C. 687, 692 (1957); *J. D. Abbott*, 28 T. C. 795, 808-809 (1957); *Anthony Delsanter*, 28 T. C. 845, 861-862 (1957); *Walter H. Kaltreider*, 28 T. C. 121, 126 (1957); *Marvin Maxey*, 26 T. C. 992, 996 (1956); *Harry Hartley*, 23 T. C. 353, 360, *modified*, 23 T. C. 564 (1954); *G. E. Fuller*, 20 T. C. 308, 316 (1953), *aff'd., on other grounds*, 213 F. (2d) 102 (10th Cir. 1954)], and by some District Court decisions [*Palmisano v. United States*, 159 F. Supp. 98 (E. D. La. 1958); *Farrow v. United States*, 150 F. Supp. 581 (S. D. Cal. 1957); *Peterson v. United States*, 141 F. Supp. 382 (S. D. Tex. 1956)].

While this court has affirmed three Tax Court decisions which have sanctioned imposition of penalties under both § 294(d)(1)(A) and § 294(d)(2) where no declaration of estimated tax had been filed, examination of the briefs and appendices in these cases discloses that the propriety of imposing the penalty for substantial underestimation where no estimate at all had been filed was not raised in this court. [*John Federika*, 14 CCH Tax Ct. Memo. 652, 658 (1955), *aff'd., per curiam*, 237 F. (2d) 916 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957); *Robert Fogel*, 14 CCH Tax Ct. Memo. 718, 728 (1955), *aff'd., per curiam*, 237 F. (2d) 918 (6th Cir. 1956); *R. M. Clayton*, 15 CCH Tax Ct. Memo. 105, 109 (1956), *aff'd., per curiam*, 245 F. (2d) 238 (6th Cir. 1957).] The question remains open for examination then as *res integra* here.

Even though this problem of concurrent penalties exists only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax [Int. Rev. Code of 1954, §§ 6651(c), 6654, and see 3 U. S. Code Cong. & Ad. News (1954) 4544, 4567, 5241-5242], the problem

remains an important one because of cases yet to be decided which will be ruled by the 1939 Code [see Int. Rev. Code of 1954, § 6654(h)].

The argument in support of the validity of that part of Treasury Regulation 111 § 29.294-1(b)(3)(1) [26 C.F.R. (1949)] declaring that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero," has been well stated in *Palmisano v. United States, supra,* 159 F. Supp. 98, and *Farrow v. United States, supra,* 150 F. Supp. 581. [See also *G. E. Fuller, supra,* 20 T. C. at 316.]

But to give effect to the quoted regulation presents a problem even greater than the logical difficulty encountered in saying that one who has filed no estimate at all has thereby underestimated his tax. [See *Barnwell v. United States,* 58-1 U.S.T.C. Par. 9374 (E. D. S. C. Feb. 4, 1958).] For although the Congress treated failure to file a declaration of estimated tax and substantial underestimation of tax as separate and distinct acts under the 1939 Code, and provided separate and different penalties for each, the regulation renders a taxpayer who has failed to file a declaration ipso facto subject to both the penalty for failure to file and the penalty for substantial underestimation. As the Tax Court itself observed in rebuffing another attempt of respondent to extend these penalties by implication: "If the legislature had intended such a result it would have had been a simple matter so to provide." [*Anthony Delsanter, supra,* 28 T. C. at 862.]

Moreover, inasmuch as the regulation imposes a penalty in addition to one expressly imposed by the statute itself for the same omission, we are unable to perceive wherein the regulation is necessary to effectuate the

statutory taxing scheme. Section 294(d) of the Internal Revenue Code of 1939 is penal in nature and to be strictly construed. [*Stephan v. Commissioner*, 197 F. (2d) 712 (5th Cir. 1952); *Barnwell v. United States*, *supra*, 58-1 U.S.T.C. Par. 9374; *Davis v. Dudley*, 124 F. Supp. 426, 429 (W. D. Pa. 1954); see *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284, 296 (1954).] "Penalties are never extended by implication" [*Elliott v. Railroad Co.*, 99 U. S. 573, 576 (1878); *United States v. J. H. Winchester & Co.*, 40 F. (2d) 472 (2d Cir. 1930)], and "all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfried, Inc. v. Commissioner*, 162 F. (2d) 628, 633 (3rd Cir. 1947).]

Furthermore, even if the exactions involved be treated as "additions to Tax," as they are denominated by § 294 of the 1939 Code, the regulation runs counter to the long established rule that "statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used." [*United States v. Merriam*, 263 U. S. 179, 187-188 (1923); *Crooks v. Harrelson*, 282 U. S. 55, 61 (1930); *Reinecke v. Gardner*, 277 U. S. 239, 244 (1928); *Gould v. Gould*, 245 U. S. 151, 153 (1917); *cf. Parker Pen Co. v. O'Day*, 234 F. (2d) 607, 609 (7th Cir. 1956).]

Mindful of the cogent reasoning of the Tax Court and District Court opinions sustaining the regulation, we nevertheless are of opinion that Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)] is invalid insofar as it provides that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero." In so holding we are mindful too that, as the Tax Court and the District Courts have pointed out, Treasury regulations are presumptively valid. But we think that in this in-

stance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, "unreasonable and plainly inconsistent with the revenue [statute]," and so cannot be sustained. [*Commissioner v. South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).]

This conclusion is buttressed by the fact that it is in accord with that reached by the majority of the District Courts which have considered the problem. [*Barnwell v. United States, supra*, 58-1 U. S. T. C. Par. 9374; *Erwin v. Granquist*, 57-2 U. S. T. C. Par. 9732 (D. Ore. 1957), *aff'd.*, 253 F. (2d) 26 (9th Cir. 1958); *Powell v. Granquist*, 146 F. Supp. 308, 312 (D. Ore. 1956), *aff'd.*, 252 F. (2d) 56 (9th Cir. 1958); *Jones v. Wood*, 151 F. Supp. 678 (D. Ariz. 1956); *Stenzel v. United States*, 150 F. Supp. 364 (N. D. Cal. 1957); *Hodgkinson v. United States*, 57-1 U. S. T. C. Par. 9294 (S. D. Cal. 1956); *Owen v. United States*, 134 F. Supp. 31, 39 (D. Neb. 1955), *modified on another point sub nom. Knop v. United States*, 234 F. (2d) 760 (8th Cir. 1956); *Todd v. United States*, 57-2 U. S. T. C. Par. 9768 (N. D. Ga. 1957); *Glass v. Dunn*, 56-2 U. S. T. C. Par. 9840 (N. D. Ga. 1956); *United States v. Ridley*, 127 F. Supp. 3, 11 (N. D. Ga. 1954); *United States v. Ridley*, 120 F. Supp. 530, 538 (N. D. Ga. 1954).]

The judgment of the Tax Court must therefore be reversed as to the additions to tax under § 292(d)(2). However, our conclusion that the claimed deductions were properly disallowed compels us nonetheless to reach the constitutional issues raised as to the income tax provisions of the Internal Revenue Code of 1939.

Petitioner asserts that these income tax provisions are unconstitutional because: (1) the rates are so high

as to make the levy not a tax but a confiscation of property contrary to the Fifth Amendment to the Constitution, (2) the progressive rates are unconstitutional, and (3) the "income tax law considered as a whole in its excessive rates and arbitrary provisions is openly subversive of the fundamental philosophy of the Constitution of the United States and repugnant to its continued existence."

The Tax Court summarily disposed of these constitutional issues with the statement: "It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does not invalidate the taxing act." [16 CCH Tax Ct. Memo. at 91.]

This declaration by the Tax Court completely overlooks petitioner's arguments by assuming the very thing that he disputes, namely, whether the Congress has the power to enact an income tax law like that found in the Internal Revenue Code of 1939.

While holding that the courts may not disturb the judgment of the Congress because of indirect effects of a statute that clearly represents an exercise of the taxing power [see, for example, *McCray v. United States*, 195 U. S. 27 (1904)], on more than one occasion the Supreme Court has adverted to the possibility that a law, although denominated a taxing statute, might not be a taxing statute at all, but one which on its face has crossed the boundary from the classification "tax" to the classification "taking," so as to become subject to the limitations of the Fifth Amendment to the Constitution. [*Steward Machine Co. v. Davis*, 301 U. S. 548, 585 (1937); *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24 (1916).]

We know of no authority holding that the Congress may constitutionally enact a law which, although called a tax statute, on its face amounts to a taking of private property without compensation therefor. That such a law would fall within the area of "taking," rather than the area of "taxing," and so be subject to judicial nullification because of the limitations of the Fifth Amendment was clearly recognized by Mr. Chief Justice White speaking for the Court in *Brushaber v. Union Pacific R. R., supra,* 240 U. S. 1, where he pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise "a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." [240 U. S. at 24-25.]

This principle was also recognized by Mr. Justice Cardozo speaking for the Court in *Steward Machine Co. v. Davis, supra,* 301 U. S. 548, when he wrote: "[W]e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." [301 U. S. at 585.] Nor do we forget the ringing words of Mr. Justice Holmes when, in dissent, he declared: "The power to tax is not the power to destroy while this Court sits." [*Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U. S. 218, 223 (1928).]

Since the Tax Court applied an incorrect legal standard in judging petitioner's claim of unconstitutionality,

it would be proper to remand the case to enable that court to weigh the evidence in light of correct legal standards. However, on surveying the entire record from which it appears that petitioner fully presented to the Tax Court both his constitutional arguments and his evidence supporting them, we think there is no reasonable basis in fact or law for a holding that the income tax provisions of the Internal Revenue Code of 1939 are unconstitutional either on their face or as applied to petitioner in this case.

The 1939 Code is unquestionably a taxing statute in substance as well as in name. The constitutionality of progressive tax rates is long settled. [*Knowlton v. Moore*, 178 U. S. 41 (1900); *Brushaber v. Union Pacific R. R., supra*, 240 U. S. 1.] The classifications drawn in question here do not appear to be either arbitrary or unreasonable in any constitutional sense. To the contrary, in large part they represent "the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." [*Burnet v. Wells*, 289 U. S. 670, 676 (1933).]

Nor can we say that the rates of tax, admittedly high, have reached confiscation or a "taking" in the constitutional sense. All in all, much as we may as men sympathize with petitioner's arguments about our tax plight, as judges we must say that he has addressed them to the wrong forum; they are for the Congress, and not for the courts.

For the reasons stated, the judgment of the Tax Court is reversed insofar as it sustains the additions to tax under § 292(d)(2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed June 18, 1958.)

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed insofar as it sustains the additions to tax under § 294(d)-(2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

ORDER DENYING PETITIONS FOR REHEARING.

(Filed September 3, 1958.)

Before: SIMONS, Chief Judge, MILLER, Circuit Judge, and MATHES, District Judge.

PER CURIAM.

Each party has petitioned for a rehearing. Petitioner but restates a portion of his earlier argument.

Respondent, however, now advances the contention that "the Treasury Regulation in question could hardly be inconsistent with the statute . . . because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute." [Compare Treasury Regulation 111 § 29.294-1(b)(3)(i), 26 C.F.R. (1949) with S. Rep. No. 221, 78th Cong., 1st Sess. 42 (1943 Cum. Bull. 1314, 1345), and H. R. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943 Cum. Bull. 1351, 1372).]

Respondent also calls to our attention the recent decisions of *Patchen v. Commissioner*, ___ F. 2d ___ (5th Cir., July 23, 1958), *Abbott v. Commissioner*, ___ F. 2d ___ (3rd Cir., July 31, 1958), and *Hansen v. Commissioner*, ___ F. 2d ___ (9th Cir., Aug. 4, 1958). These decisions, rendered subsequent to the publication of our opinion in this case, express disagreement with our holding that the penalty for failure to file a declaration of estimated tax [Int. Rev. Code of 1939 § 294(d)(1)(A)] and the penalty for substantial underestimation of estimated tax [*id.* § 294-(d)(2)] cannot be imposed concurrently so as to work the exaction of a double penalty.

In the *Patchen* case the learned Court of Appeals for the Fifth Circuit appears to credit as authority decisions of this Court in which the problem was never raised. [See footnote 15 citing *Fogel v. Commissioner*, 237 F. 2d 918 (6th Cir. 1956) and *Clayton v. Commissioner*, 245 F. 2d 238 (6th Cir. 1957). See also 3 Roehner, Federal Taxation Par. 153 at page 191 (Aug. 8, 1958).]

In the *Abbott* case the learned Court of Appeals for the Third Circuit recognizes that: "An examination of the underestimation provisions of Section 294(d)(2), taken alone, leaves unanswered the question of whether the penalty provided should be imposed where no declaration of estimated tax is filed." [*Abbott v. Commissioner, supra*, ___ F. 2d at ___] The Court then observed that "[t]he statute being ambiguous, resort to legislative history is proper in an endeavor to ascertain Congressional intent" [*ibid.*]; and concluded from the legislative history that the Congress intended the double penalty since "the regulation is precisely in accord with the Congressional intent expressed in the conference report." [*Ibid.*]

In the *Hansen* case the learned Court of Appeals for the Ninth Circuit likewise concluded from the legislative

history that "[n]o other conclusion is possible but that Congress intended" to provide in the Act for the double penalty. [*Hansen v. Commissioner, supra,* F. 2d at .]

However, it has long been our view that "[such an] intention of the Congress must be gathered from the language of the Act. . . ." [*United States v. Stroop*, 109 F. 2d 891, 893 (6th Cir. 1940); see also *Hopkins v. Commissioner*, 144 F. 2d 683, 692 (6th Cir. 1944).]

"Further," as the Court of Appeals for the Third Circuit has pointed out on another occasion, "it is well-settled that in the application of penalties, 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.'" [*Hatfried, Inc. v. Commissioner*, 162 F. 2d 628, 633 (3rd Cir. 1947).]

While our great respect for the learning and acumen of the Courts of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are nonetheless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.

It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval. [U. S. Const. Art. I, §§ 7, 8, clause 1; Amend. XVI; see: *Langstaff v. Lucas*, 9 F. 2d 691, 692-693 (W. D. Ky. 1925), *aff'd upon the opinion of the District Court*, 13 F. 2d 1022 (6th Cir.), *cert. denied*, 273 U. S. 721 (1926);

Masonite Corp. v. Fly, 194 F. 2d 257, 260 (5th Cir. 1952); *Helvering v. Rebsamen Motors, Inc.*, 128 F. 2d 584, 587-588 (8th Cir. 1942).]

Especially is this so where, as in the case at bar, the penalty sought to be imposed by administrative regulation is cumulative with and in addition to another penalty clearly and expressly imposed by the statute for the identical omission. Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither "presumptions of validity" nor "reenactment doctrines" can serve to validate it. [*United States v. Calamaro*, 354 U. S. 351, 358-359 (1957); *Koshland v. Helvering*, 298 U. S. 441, 446-447 (1936); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U. S. 129, 134-135 (1936); *Lincoln Elec. Co. Employees' Profit-Sharing Trust v. Commissioner*, 190 F. 2d 326, 330 (6th Cir. 1951); *Langstaff v. Lucas*, *supra*, 9 F. 2d at 692-693; see *United States v. Abrams*, 197 F. 2d 803, 805 (6th Cir.), *cert. denied*, 344 U. S. 855 (1952).]

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law." [*Morrill v. Jones*, 106 U. S. 466, 467 (1882).]

Each of the petitions for rehearing is denied.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.

Preamble to the U. S. Constitution:

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Article I, Section VIII:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 14:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

26 U. S. C. 1952 ed., Sec. 294.

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(d) [As added by Section 118(a) of the Revenue Act of 1943, *supra*.] *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. * * *

* * * * *

(2) [As amended by Section 6(b)8 of the Individual Income Tax Act of 1944, *supra*.] *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60(a), or 66⅔ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. * * *

No. 745

In the Supreme Court of the United States

OCTOBER TERM, 1958

ERLE N. JACOBS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 545.

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 36a–41a)[1] are not officially reported. The opinion of the Court of Appeals (Pet. 13–23) is reported at 258 F. 2d 568.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958. (Pet. 24.) The taxpayer's petition for rehearing was denied on September 3, 1958. (Pet. 24–27.) The petition for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

[1] Record references are to the separately printed appendix to the taxpayer's brief in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the court below correctly decided that the Internal Revenue Code of 1939 is not unconstitutional because of its progressive rates of taxation and further that such rates are not excessive or arbitrary within the meaning of the Fifth Amendment to the Constitution.

2. Whether the court below correctly decided that Section 294 (d) (1) (A) of the Internal Revenue Code of 1939, which imposes an addition to the tax for failure to file a declaration of estimated income tax required by Section 58 of the Code, is not unconstitutional.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT

* * * * *

(d) [As added by Section 118 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 percentum of each installment due but unpaid, and in addition, with respect to each

such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. * * *

* * * * * *

(26 U. S. C. 294.)

STATEMENT

The Commissioner has filed a petition for a writ of certiorari in this same case, No. 553, this Term. The question presented by that petition, however, is unrelated to the questions presented by this petition. In No. 553, the question is whether, where a taxpayer has failed to file a declaration of estimated income tax as required by Section 58 of the Internal Revenue Code of 1939, the Commissioner may impose concurrently an addition to the tax under Section 294 (d) (2) of the Code for substantial underestimation of tax, as well as an addition under Section 294 (d) (1) (A) for failure to file a declaration.

The facts pertinent to the questions raised in this petition may be stated as follows:

The respondent determined the net income and tax liability of the petitioner for the years 1947 to 1950 as follows (R. 11a–15a):

	Income	Tax	Penalty
1947	$9,412.30	$1,552.01	$636.32
1948	15,968.13	3,565.38	1,290.01
1949	9,047.73	1,664.60	583.95
1950	15,862.18	4,400.43	231.04

The penalties included additions for failure to file a declaration of estimated income tax for each of the years involved.

The petitioner petitioned the Tax Court for redetermination (R. 2a–7a) and that court upheld the determination of the Commissioner (R. 36a–41a).

On appeal to the Court of Appeals for the Sixth Circuit, the petitioner, in addition to challenging the validity of the determinations of deficiencies, also asserted the unconstitutionality of the provision requiring a declaration of estimated tax and of a progressive income tax generally. The court below upheld the constitutionality of the tax law in both respects (Pet. App. 13–27).

ARGUMENT

The decision below, insofar as it pertains to the questions presented by this petition, is correct and there is no conflict of decisions.

1. The claim that the Internal Revenue Code of 1939 is unconstitutional because it provides for progressive rates of taxation, and, further, because such rates are allegedly excessive and arbitrary (Pet. 8–12), is plainly without substance. As this Court said in *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 25:

> It is true that it is elaborately insisted that although there be no express constitutional pro-

> vision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the Government a progressive tax was imposed by Congress and that such authority was exerted in some if not all of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in *Knowlton* v. *Moore, supra,* and the right to urge it was necessarily foreclosed by the ruling in that case made.

Plainly, Congress has the power to levy the income tax. Constitution, Amendment XVI. "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers." *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 99. To violate the Constitution, the burden must be so arbitrary as to amount to a confiscation of property. *Brushaber* v. *Union Pacific R. Co., supra,* pp. 24–25; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223. There has not been a showing here that the rates are so arbitrary as to amount to a confiscation of property. The taxpayer's assertion that the rates are unconstitutionally excessive and arbitrary is apparently based on the assumption that his claimed deductions are allowable (but clearly they are not) and that the nation can do without high taxes (Pet. 3, 8–12). As the court below indicated (Pet. 23), although the rates imposed by

the 1939 Code are high, they have not reached "confiscation" or a "taking" in the constitutional sense.

2. In rejecting taxpayer's claim that Section 294 (d) (1) (A), *supra*, p. 2, is unconstitutional, the court below observed that the taxpayer's attack upon the constitutionality of the provisions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax (Section 58) and imposing an addition to the tax for failure to file (Section 294 (d) (1) (A)) is "wholly without merit", citing two cases in which this Court recently denied certiorari. *Erwin* v. *Granquist*, 253 F. 2d 26 (C. A. 9th), certiorari denied, 356 U. S. 960; *Walker* v. *United States*, 240 F. 2d 601 (C. A. 5th), certiorari denied, 354 U. S. 939. In those cases, arguments similar to the ones that have been advanced by this taxpayer were rejected by the Ninth and Fifth Circuits, respectively. And in *Helvering* v. *Mitchell*, 303 U. S. 391, 399, this Court said:

> As stated in *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339:
>
> > In accord with this settled judicial construction, the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

Thus, as the court below observed (Pet. 16), the provisions of the Code here under attack are a valid exercise of the taxing power conferred by Article 1, Section 8, and the Sixteenth Amendment to the Constitution.

CONCLUSION

The decision below pertaining to the questions raised by this petition is correct and no other reason appears for further review by this Court. Therefore, the petition should be denied.

Respectfully submitted,

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DECEMBER 1958.

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In the Supreme Court of the United States

No. 545.

OCTOBER TERM, 1958.

FRED N. ACKER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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In the Supreme Court of the United States

No. 545.

OCTOBER TERM, 1953.

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COMMISSIONER OF INTERNAL REVENUE,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

FACTS AND FIGURES.

The short statement of taxable income in the Respondent's brief on page 4 should not be permitted to detract our attention from the real issue in this case. If the Court is interested in figures, then the statistical facts (all of them—not totals which are meaningless by themselves) are detailed on page 3 in the Petitioner's application for a Writ.

In 1947 the Commissioner says that the taxpayer had a taxable income of $9,412.00, but actually the taxpayer had a genuine money loss of $11,901.38. In 1948 the Commissioner says the income was $15,968.13, but actually the taxpayer's income was $4,009.57. The difference is not in mathematics but in the law. The law alters facts

arbitrarily. The result is that the taxpayer is being taxed at the rate of 767% of his LOSS in 1947 and for 89% of his gain in 1948. Moreover, the taxpayer has not been taxed in proportion to his income but progressively. He has been subdivided and taxed twice—first as the basic man and again as the surtax man.

TAXES OR CONFISCATION.

The Solicitor of the United States seems to make light of this situation and to pass it off as just routine. In fact it is routine procedure. For him to pretend that the above result is not confiscatory, excessive or destructive is an absurdity. To be exact, the Tax Court and the Commissioner's briefs in the lower courts proceeded precisely on the assumption that the Government must have an unlimited power to tax or lose the instant case. It was this situation that gave meaning to the Commissioner's claim that the Government has an unlimited power to tax even though the tax is confiscatory, excessive or destructive.

The statement by the Tax Court about the absolute taxing power of the Government might be thought to be an exaggeration, but the Commissioner did not think so. Nor did the Attorney General of the United States think it was a mistake. He repeated this claim verbatim in his brief before the Court of Appeals.

When Government counsel argued this contention before the Court of Appeals in answer to an inquiry by the Court, she reasserted this claim and was met by spontaneous laughter. When, later on, the same inquiry was repeated, the Government's counsel stood silent for a long period and rather than answer the question, terminated the Government's case with the statement, "The Court knows very well that I have been trying to avoid answer-

ing that question," and sat down in confusion to the renewed laughter of every person in the courtroom.

It was a sad performance. The Petitioner felt great sympathy for the Government's counsel who was being forced to defend the indefensible against her evident personal conviction.

COURT OF APPEALS DECISION.

Considering what the reviewing court had to say about the power to tax, one would have thought it conclusive that they would grant the Petitioner some relief. Instead, they hedged. They cloaked themselves in the statement, "Nor can we say that the rates of tax, admittedly high, have reached confiscation or 'taking' in the constitutional sense." What does that mean? There was nothing to elucidate or explain the words "constitutional sense." Because it was a hard question politically, the Court elected to do nothing. As long as the problem was general they knew the answers, but when it came to the specific, the Court preferred to pass it on to the Supreme Court. They knew it must end there. The Court understood very well that while the title to the case was "Acker vs. Commissioner," the real parties were the PEOPLE vs. the Commissioner—the individual citizen as a free and equal man vs. the unlimited power to tax.

THE SOLICITOR HESITATES.

In this Court the Solicitor General avoids repeating the claim of an unlimited power to tax, but he does not say one word to repudiate the claim. He cannot do so because he knows as well as the world knows that taxes of 50% at $16,000, and 75% at $50,000, and 91% over $100,000 is confiscation. So is the arbitrary disallowance

of losses AS losses confiscation. He knows that the arbitrary segregation of people into economic categories is contrary to the principle of equality. But he does not have the fortitude to say it openly so that everybody in America and the world will plainly understand that the Constitution is dead in the matter of money as between him and the Bureau of Internal Revenue. Let us be honest. If the Commissioner of Internal Revenue has an unlimited power to tax, he is in truth also the Commissar of Confiscation.

If you consider these words too harsh, what do you call the claim, "Congress has the power to tax even though the taxes are confiscatory, excessive or destructive"?

By way of answer, this taxpayer has always been of the opinion that the purpose of government is the protection of the citizen in his person and his property. Too many of our leaders have lost their wisdom, and so the people perish. Truly enough, not in a cataclysm, but slowly by decay of the spirit. Such is the lesson of history to those who have eyes to see and minds to think. Hindsight we all have, but foresight is the property of the wise.

THE CASES.

The Respondent's brief makes reference to five very well-known tax cases on the theory that they support the general thesis of an unlimited power to tax. This is not the time to individually analyze these cases beyond the absolute statement that not one of these cases taken separately or in combination support a GENERAL REVENUE BILL that is confiscatory, excessive or destructive. On the contrary, they do the reverse. True, the 1916 *Brushaber* case does support a progressive tax, but at rates that compare to the present rates like a mouse does to an elephant.

What the Court did in 1916, they did almost innocently, believing that Congress would keep within the bounds of reason and decency. They were wrong, as the intervening years amply demonstrate.

We have long reached the point of naked confiscation. What the Supreme Court did not believe would happen, they also knew could happen. And so, Chief Justice White, as already noticed in the Petitioner's brief in main, promised to review the principle of progression if it got out of hand. This Petitioner now most respectfully urges this Court to REDEEM this solemn promise.

EQUAL JUSTICE UNDER LAW MUST BE LIVED.

The world watches what we do here. In a very large sense we have visibly lost our leadership in the Court of Nations in the exact proportion that we have abandoned our fundamental principles. Right now the World seems to be in an era of taking stock of itself. Europe seems to be settling down and rediscovering the old virtues. We, too, could profit by rediscovering the source of our own greatness.

The immense good that this Court could accomplish with a soundly reasoned opinion on the fundamentals of taxation within the framework of our constitutional background would amaze even ourselves. Why not say now what must be said in the end in any event? The power to tax is not the power to confiscate.

Respectfully submitted.

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